UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JEREMY STORY and DUSTIN CLARK, Plaintiffs,	:	
	:	Case No.
vs.	:	AU:22-CV-00448
	:	
ROUND ROCK INDEPENDENT SCHOOL DISTRICT, ET AL, Defendants.	:	April 11, 2023
	:	Austin, Texas

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TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE DAVID A. EZRA
SENIOR UNITED STATES DISTRICT JUDGE

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(April 11, 2023, 1:26 p.m.)

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COURT SECURITY OFFICER: All rise.

COURTROOM DEPUTY CLERK: Austin 22-CV-00448, Story, et al versus Round Rock Independent School District, et al.

THE COURT: All right. Can I have appearances please?

MS. LONG: Kathryn Long and Adam Rothey for the Round Rock ISD defendants.

MR. NORRED: Warren Norred for plaintiffs Jeremy Story and Dustin Clark.

THE COURT: I'm sorry, can you give me your name?

MR. NORRED: My name is Warren Norred, N-O-R-R-E-D, and Jeremy Story, one of my plaintiffs is here.

THE COURT: All right. You may proceed.

MS. LONG: Would you like us to stand here?

THE COURT: You can do it right there.

MS. LONG: Thank you, Your Honor, and may it please the Court. If the Court will indulge, I will be addressing the primary First Amendment claims, the Section 1983 Monell liability and failure to train and failure to supervise. With respect to the claims against the officer, defendants and the intermediate -- the independent intermediary doctrine and the issue of probable cause, my colleague, Adam Rothey, will be addressing that if the Court will allow.

THE COURT: Yes, but we don't have all afternoon.

MS. LONG: I understand. The claims in this lawsuit arise from two meetings of Round Rock ISD's Board of Trustees, an August 16th, 2021 special or called board meeting and a September 14th, 2021 regular board meeting. It has been undisputed in this case that both meetings presented a limited public forum and, therefore, that is the legal analysis that will apply to the motions to dismiss. Only Mr. Story's claims relate to the August 16th board meeting. Mr. Clark asserts no claims related to what transpired at that board meeting specifically. And both Mr. Story and Mr. Clark have claims arising from events that occurred at the September 14th board meeting.

The August 16th board meeting was not the monthly regular board meeting, but was convened for the district's board to consider two specific agenda items. As the Delta variant of COVID was spreading, the two agenda items were the COVID-19 employee leave and the fall 2021 COVID health and safety protocols. Because this was a specially called meeting under the district's board policy BED Local, which is challenged here, a limited public comment rule applied that only allowed the people who had signed up for public comment to speak on agenda items.

At the beginning of this meeting, the president of the board just for context noted that there were 180 speakers that were going to be given two minutes to speak during public

comment and just the public comment portion would last more than six months, and noted the rules of the forum that speakers were only allowed to speak on the posted agenda items. About two and a half hours into the meeting, Mr. Story approached the podium. Trustee Weir noted e-mails he previously sent the trustees, which are attached as Exhibit Six to the plaintiff's appendix, and noted the e-mails indicated he had intended to speak on topics off the agenda. When he approached the podium, there was back and forth where Trustee Weir and Mr. Story discussed whether he was going to stick to the items on the agenda, but Mr. Story was allowed to speak. And as he was talking about COVID-19 and mask and Executive Order GA-38, he was allowed to proceed. But when he veered from the posted agenda item, President Weir, Board President Weir told him to stop. And when he wouldn't stop speaking off the agenda items, she asked the officers to remove him from the room.

Notably in contrast, Mr. Clark actually spoke at the August 16th meeting about masks without interruption from the board at all because he was discussing the agenda items. The September 14th board meeting was a regular board meeting where public comment could comment on anything that they wanted. The district administration, consistent with the COVID-19 safety protocols, had established the social distancing within the room, spacing chairs 6 feet apart which reduced the overall capacity of the room. If people did not have one of the seats,

they were not allowed in the room, but there was an overflow area and the open meeting was live streaming. People were allowed to enter the meeting when it was their time for public comment, so every single person signed up for public comment could enter the meeting for public comment.

THE COURT: They maintain that before the meeting before or at some meeting before, there were multiple -- over a hundred people, and the meeting after there were over a hundred people. This was the only one that allegedly had this, what was it, 18 chairs or something like that?

MS. LONG: They picked two pictures, they put three pictures in their pleading. One was a June 2021 board meeting, so it was almost three months before this meeting. And just temporally, that was before the Delta variant and before COVID protocols actually began being put in place by schools again. So that was a June meeting. The second meeting that they reference was a September 22nd. After this meeting when they realized there was attendance, you can tell from the pictures, they actually moved to an auditorium as opposed to kind of a lecture area. And the auditorium was much larger, but even in the picture in the Complaint, you can see people are spaced apart, it's just a larger venue. They moved the venue. So the three images that they discuss in reference in the Complaint, one was three months earlier before the Delta variant and the other was at a different location where they moved the board

meeting after September 14th, so it was a little different.

THE COURT: All right.

MS. LONG: Mr. Story and others were displeased with the social distancing rule which was their absolute right to disagree with the rule. According to the Complaint, Mr. Story and others questioned or argued with police officers for 45 minutes regarding the social distancing rule. Although district police officers were stationed at the doors to enforce the rule, Mr. Story admittedly attempted to enter the door through the police officers multiple times. And that's in paragraph 72 of the Complaint.

At some point after trying to push through them several times to enter in the room, although they were telling him he could not enter the room because the chairs were full, Mr. Story was trying to push back past the officers next to a pole, and according to the Complaint, the officers bear-hugged him around the pole where he was trying to squeeze through space and the pole cut him on the back.

Separately, Mr. Clark was in the meeting. He was in one of the chairs in the meeting, but Complaint does not plead that he was speaking during the public comment in the meeting. Rather in the Complaint, paragraph 97 discusses that throughout the meeting he attempted to instruct the board about various things about the meeting, his disagreement with the social distancing rule, his disagreement with the tax rate, but not

during public comment. He was just instructing the board in a meeting separate and apart from public comment.

When President Weir asked him to stop interrupting the meeting, he failed to heed her warnings and he was removed due to his disruptive behavior after multiple warnings. From these two incidents, Mr. Story and Clark assert First, Fourth and 14th Amendment in Texas Open Meetings Act claims against the defendants. With respect to Section 1983 claims, for each claim, the plaintiffs have to show an underlying constitutional violation, that's kind of the threshold requirement. With respect to the individual defendants, they have to plead facts to overcome the individual defendants' assertion of qualified immunity. Specifically they have to show that the constitutional right allegedly violated was clearly established and that the individuals acted in an objectively unreasonable manner in light of this clearly established law. And with respect to Round Rock ISD, although they don't have to overcome qualified immunity, they must plead facts to show entity liability either through direct action of the board as a body corporate or through Monell liability that a policy or custom, official policy or custom of the Round Rock ISD's board caused -- was the moving force of the violation or some other similar theory of Monell liability such as failure to train or failure to supervise.

Before discussing the lack of underlying

constitutional violation and because there are so many individual defendants, I think it's very important for the Court to look through the Complaint to see what is actually pleaded with respect to the actions of each individual because the individuals' actions are what have to be measured under the qualified immunity established to see if they individually violated plaintiff's clearly established constitutional rights.

For example, other than in paragraph nine regarding the identity of the parties, former trustee, Dr. Xiao, is mentioned only twice in the Complaint. And neither of them relate to any allegations of First Amendment violations, Fourth Amendment violations or 14th Amendment violations. They only talk about his involvement in a procedural vote regarding social distancing requirement. The same is true of Trustee Vessa, former Trustee Vessa, they only mention her three times in the Complaint and none relate to the underlying constitutional violations at issue. While Trustee Feller and Harrison are mentioned several times in the Complaint, none of them actually address their involvement or their role or any actions they took that resulted in the removal of the plaintiffs from the meeting, any type of limitation on their speech even if it were protected or the alleged arrest or excessive force that plaintiffs complain of in the Complaint. In fact, the allegations with respect to Trustee Harrison and Feller, the only allegations that they plead, and it's

interesting, is plaintiff's plead in one paragraph that these board members stated that Story should leave the meeting, apparently believing Story's intended words could not be possibly related to an agenda item. So the only actions of Trustee Feller and Trustee Harrison that relate to any type of removal from the meeting or limit it, they affirmatively plead it's because these trustees apparently believed the comments had nothing to do with the posted agenda items, not to suppress protected speech. And the same is true for some of the officer defendants as well because they just kind of group everyone together and don't show what officers were involved in what actions. And without those type of individual actions, it's very difficult to hold an individual liable in their individual capacity, particularly in light of qualified immunity.

With respect to their First Amendment claims, I want to start with the facial -- their claims that BED Local and a social distancing rule are facially unconstitutional. Because it's an -- it's undisputed that as a limited and public forum, speech can be restricted if it is reasonable in light of the purpose served by the forum and does not discriminate on the basis of viewpoint. To show that either rule is facially unconstitutional, they must show there's no set of circumstances under which the rule would be valid, and the Court may not look beyond the text of the rule. Looking at BED Local, it limits public comment only at special and called

board meetings to items on the agenda. Looking at the text of the rule, this is a reasonable restriction to serve the purpose of the forum, a special meeting to discuss a few select designated matters as opposed to a regular monthly meeting of the board where citizens can speak on any matter. So they have another forum where they can speak on any matter, the regular monthly board meetings. And based on the text of the rule, it does not discriminate based on viewpoint. Regardless of your view on an off-topic item, you cannot speak on it because it is off topic. At the end of the day, this is simply a time, manner and place restriction, you can't comment on off-agenda items at special or called board meetings, but you can at another time in a regular board meeting.

Finding BED Local's limited public comment rule is facially constitutional is consistent with the Fifth Circuit holding in *Fairchild versus Liberty Independent School District*, Fifth Circuit 2010. And in fact, in the supplement the plaintiffs filed just a few hours ago where they presented the *Ryan vs. Grapevine-Colleyville Independent School District*, in that case they found not a BED Local with respect to off-topic agenda, but a different one that limited certain speech based on whether you could provide critical comments of employees, found that facially constitutional and said it was governed by the Fairchild case, which is cited in our briefing.

In fact, the Northern District held in *Wenthold versus*

City of Farmers Branch that in limited public forums, a government entity is justified in limiting its meeting to discussion of specified agenda items and imposing reasonable restrictions to preserve the civility and decorum necessary to further the forum's purpose. BED Local on its face, it's a promulgated policy that is adopted by almost every school district in the State of Texas as well as other governmental entities for special and called board meetings that limit the comments to the agenda items the board will be discussing and voting on that day.

It's not overly broad and it's not -- their vagueness challenge fails based on the pleaded facts alone, because the pleaded facts say they were warned that they could only talk about agenda items, and it was after that warning that their speech was stopped. The fact that that warning occurs basically precludes a vagueness challenge under the governing case law. Because those facts are affirmatively pleaded, their vagueness challenge is a nonstarter. The Complaint actually negates any vagueness challenge to BED Local. The socially distancing rule which limited seating was a rule that concerned conduct not what anyone could write or say. And courts outside the Fifth Circuit who dealt with social distancing requirements in many respects had decided not to treat them as if they were regulations of speech, but orders regulating conduct. There's no allegation that somebody could not come in the room to make

public comment, that only people sitting in the room could make public comment. There's no pleaded facts that those in the meeting had a greater right to make public comment. That the individuals were not allowed to be in the room the entire time is not enough.

Moreover, if this was a nonstarter from the beginning because it restricted conduct and not speech, the restriction was reasonable in light of the purpose served by the forum and was viewpoint neutral. There was no selection of people who could be in the room based upon viewpoint, there's no allegation that there was. And these were not prior restraints on speech. In fact, the Complaint pleads facts to show that Mr. Story participated and was restrained only after he violated the rule and disregarded warnings to stop. And the social distancing rule had no prior restraint, everybody who was signed up to comment before the board had to actually adjourn the meeting because of the disruption would have -- was being allowed to comment.

The facial unconstitutionality is fairly straightforward. The as-applied challenge -- you know, in many circumstances, an as-applied challenge at the motion to dismiss stage would be much more difficult, but this is an unusual circumstance where the plaintiffs have actually asked the Court to take judicial notice, as have the defendants, at the video recording of the meeting so that the Court can see exactly how

the rule was applied. And the plaintiffs have not objected to our request for judicial notice. And in fact, they also ask the Court to take judicial notice and have cited numerous parts of that recording in their Complaint. And the pleaded facts in the video show the limited public comment rule was not applied in an unconstitutional manner.

First, the pleaded facts show that President Weir reminded Mr. Story, before he began speaking, about the limited public comment rule. He was allowed to speak, and while he was speaking about COVID and COVID policies, he was uninterrupted because those were agenda items. He pleads specifically in paragraph 37 that as soon as he mentioned the protective order against Dr. Azaiez, something that was not on the agenda item and did not relate to COVID-19 safety policies, he was interrupted by President Weir. This shows it wasn't until he deviated from the viewpoint neutral rule that he was stopped and warned, and when he continued he was asked to be removed from the room.

But perhaps more fatal to his claim of an as-applied challenge is the examples provided in the Complaint, in paragraphs 39, because instead of showing viewpoint discrimination, they actually show viewpoint neutral application of BED Local. Paragraphs 39 A, B and C show that there was no action taken to limit speech when speakers were speaking to the topic on the agenda, mask and COVID policy,

regardless of the individual's viewpoint or position on the issue. And paragraphs 39 D, E and F show that when speakers veered off topics, both similar to Mr. Story's speech and in contrast. So one also decided to speak about the superintendent and another chose to speak about two board members who are not parties to this case who were more sympathetic to Mr. Story's cause. And in both cases they say the speaker was stopped and directed not to speak on off-topic agendas. So rather than showing disparate application or differential application or viewpoint specific application of BED Local, the pleaded facts themselves show that there is no as-applied challenge to BED Local.

And with respect to the social distancing rule, it is not a restriction on speech and there is no facts that it was applied in a discriminatory manner to limit Mr. Story's or Mr. Clark's speech. And Mr. Clark was not removed from violating the social distancing rule.

One last thing with respect to the facial constitutionality challenges. The only proper defendant for those challenges would be Round Rock ISD because they plead no facts that any board member actually voted on BED Local or that the superintendent promulgated BED Local or that any of the officers actually promulgated that policy. That's a claim against Round Rock ISD.

With respect to the retaliation claim, and I

understand there's going to be a lot of discussion of the independent intermediary doctrine, all of the exceptions, probable cause and when that doesn't apply, but I think there's reasons that the First Amendment retaliation claim doesn't even get there. You don't even need to get to the analysis. And the plaintiffs' First Amendment retaliation claim fails against the individual defendants for four primary reasons, many of which also apply to Round Rock ISD.

First, plaintiffs cannot show they engaged in constitutionally protected speech. As shown, the veering off topic at a limited public forum in violation of the proper rules is not constitutionally protected speech. So to the extent that plaintiff claims he was retaliated against or arrested or anything for that, he cannot show and Mr. Story cannot show an underlying constitutionally protected speech. Similarly, Mr. Clark's pleaded facts that he was instructing the board outside of the public comment period at a board meeting, so he was just speaking without being given the floor, interrupting other people who were trying to exercise their First Amendment rights is not constitutionally protected speech. And if that's the reason he was removed and arrested based upon the probable cause affidavit, that is not, cannot establish an underlying basis for a First Amendment retaliation or First Amendment retaliatory arrest claim.

Second, because plaintiffs cannot show that any

protected speech was the motivation behind any adverse action here, the arrest, plaintiffs cannot show that. But plaintiffs do not identify who had retaliatory animus specifically. It was this collective had retaliatory animus. And then who acted upon that evidence? They have to connect those dots and plead those facts to be able to stay the claim against an individual and only with respect to the individual who acted upon or caused others to act upon retaliatory animus.

Third, even if they could meet these first two requirements, the individuals are entitled to qualified immunity, because based upon the limited public comment rule and the social distancing requirement and the actual speech at issue in the case, it is not clearly established that that speech was constitutionally protected such that their actions could be objectively reasonable under clearly established in law.

And finally, which Mr. Rothey will discuss, because of the independent intermediary found probable cause for the arrest, this precludes the claim. But we don't even need to get to that fourth part because they cannot show that they engaged in constitutionally protected speech that this right was clearly established or show with respect to the individuals they have sued individually that they had a retaliatory animus and acted or caused to have an adverse action or arrest taken against them.

It is well established law that speech outside the bounds of the forum in a limited forum is not constitutionally protected, and at a minimum it was not clearly established that this speech was constitutionally protected.

Before getting to the Fourth Amendment and 14th, and I thought I would handle this at the end, but with respect to Monell liability with respect to First Amendment retaliation, the Fourth Amendment claim and the 14th Amendment claim, they haven't shown a board policy, custom or practice that was the moving force. They haven't talked about prior incidents to establish a custom. They haven't showed any board policy or custom of First Amendment retaliation, retaliatory arrest, excessive force or 14th Amendment due process violations to even begin to establish Monell liability, but perhaps more critically they didn't address this in their response. They completely ignored Monell liability in a response to Round Rock ISD's motion to dismiss, so they basically have dismissed and waived the claims. And it's kind of not surprising because in paragraph 215 of the Complaint, they assert they're not asserting any Section 1983 claims against Round Rock ISD, which actually contradicts earlier in their Complaint where they tried to hold Round Rock ISD liable for constitutional violations. Section 1983 is the only mechanism to do that, but regardless, they abandon their Monell liability arguments and because they abandon the Monell liability arguments, other than

if the facial constitutionality claim were to proceed, there is no viable claim against Round Rock ISD as an entity because you can't hold them liable just under respondeat superior.

And with respect to the failure to train and failure to supervise, this is when liability is at its most tenuous because of the risk in these circumstances of holding an entity liable for respondeat superior which is prohibited by Monell. But there is really no pleaded facts to support the board's failure to train. They don't actually identify anything about the board's training regimen for employees or police officers generally. So if they don't say this is what they provided them and they just provide the conclusory allegations, well, obviously because of this, they don't train them enough on excessive force. Those aren't the kind of pleaded facts for a failure to train claim because you have to show what the policy is and what is constitutionally inadequate. But beyond that, you have to show that the board was aware, had actual or constructive knowledge of deficiencies in the training or supervision provided. And even though had they had that actual or constructive knowledge, they didn't do anything and responded with the deliberate indifference. Here they plead no prior incidents of excessive force, no prior incidents of 14th Amendment violations, no prior incidents of First Amendment violations to give the board any notice whatsoever of the need for a change in their training program. And I think

it's important to note that in their pleading they talk about how the officers receive regular officer training. That's TCOLE training. The law is that if the officers -- if the people they're complaining that weren't trained actually received the legal minimum, which is TCOLE training for police officers, then the plaintiffs actually had to specify something specific about the TCOLE training that officers received that is inadequate. They don't do that. Their pleading admits that the officers get the basic officer training, which is TCOLE training that all officers receive. Given that pleaded fact, they have to do even more with respect to failure to train claim.

And without any type of prior incidents or prior information being brought to the board, they cannot show the board had the actual knowledge or constructive knowledge of deficiencies in training or supervision and responded with deliberate indifference. And those same infirmities relate to the claims against both Chief Yarbrough and Assistant Chief Williby that Mr. Rothey will discuss with respect to the Fourth Amendment and probable cause claims.

THE COURT: Okay. Thank you.

MR. ROTHEY: Good afternoon, Your Honor. May it please the Court, and I just want to hit some of the high points because Mr. Long I think has addressed a lot of the intricacies of the law. Again I also want to point out

something that Ms. Long pointed out, that when you talk about the officers and the allegations that are against the officers, there's a lot of kind of lumping everybody in one and alleging a giant conspiracy as to everybody in attempt to hold everybody liable for everything in the Complaint, but that's just not how the law works, especially with regard to false arrest claim or retaliatory arrest or excessive force.

I point out to the Court that, for example, with regard to the arrests of Mr. Story and Mr. Clark, there's no allegations in the Complaint that Officer Williby or Yarbrough or Pontillo were at all involved in any aspect of the arrest, whether it be the arrest itself which none of the officers were involved in the arrest, not even the warrant process, so Williby, Yarbrough, Pontillo, not even involved in the warrant process according to the allegations of the Complaint.

Similarly, there's no allegations in the Complaint that tie Officer Griffith, Officer Yarbrough or Officer Chavez with the excessive force claim. Again that's just a claim by Mr. Story. Getting even more granular, we point this out in the briefing. There's no allegations at all in the Complaint that identifies who exerted excessive force against Mr. Story. There's allegations that particular officers were outside the board meeting or that officer -- Assistant Chief Williby was behind a door. But there's no allegation -- the Amended Complaint never says that it was Officer Williby that

bear-hugged Mr. Story and took him to the ground or it was Officer Chavez that did it or Officer Yarbrough. There's no identification of who exerted excessive force as to Mr. Story, and just make that point to the Court and ask the Court to be mindful of that when making its decision.

Just hitting some high points on first the Fourth Amendment false arrest claim. Judge, as the Court knows, the general rule is that if an arrest warrant is supported by probable cause, then you can't state a Fourth Amendment false arrest claim. The question is here, is it supported by probable cause? The answer is yes. And how do we know that? Because Officer Griffith who signed the warrant affidavit presented it to an independent magistrate who independently evaluated the warrant affidavit and decided there was probable cause and issued the arrest warrant. So probable cause -- you can also just look at the arrest warrants themselves and the affidavits and see that there's probable cause on the face of them given the elements of the crime, which is hindering unofficial proceeding through noise or disturbance, and the conduct that's alleged in those warrants, in the warrant affidavits.

So then the question is does an exception apply? Really the only exception that the plaintiffs attempt to assert is the taint exception. And but if you look carefully at the Amended Complaint, there's no allegations that any one of the

officers or anybody exerted any influence over the independent magistrate. At most you have an allegation that the superintendent, Dr. Azaiez, texted the Williamson County judge about the efforts to arrest Mr. Story and Mr. Clark. But the Williamson County judge is not -- the County judge is not the independent magistrate. There's nothing in the Complaint that ties those two together. A County judge is a political officer. A magistrate is an appointed judge in Williamson County to specifically deal with issues of arrest warrants.

So again there's nothing in the Complaint that satisfies the taint exception to the independent intermediary doctrine. There's no Franks violation here because there's no false information in the warrant. At most again they allege that certain aspects of the warrant differ with their perspective of how things went down, but according to the Fifth Circuit in Buehler, just different interpretations of the same actions doesn't mean that there's false statements, so I don't think they state a Franks violation.

And also there's no Malley violation. This isn't a situation where we have a bare bones affidavit that says nothing other than so and so committed X crime. There's plenty of detailed facts about Officer Griffith's experience, where she got her information, what the alleged actions were to support the finding of probable cause. Again, this has been something that's held in the Fifth Circuit for decades that

since probable cause exists here, it's not a false arrest.

Turning to kind of the retaliatory arrest, again the general rule is it's not a retaliatory arrest again where it's supported by probable cause, and this is affirmed just recently as last year by the Fifth Circuit in *Gonzalez v. Trevino*, a case that I know that the Court is very familiar with. So again we just ask are the arrest warrants supported by probable cause? Yes, based on the same argument I just presented.

Now, we look at are there exceptions for in the retaliatory arrest context and we look at the Supreme Court's case in Lozman and the Supreme Court's case in Nieves. Lozman won't apply here because it involved a very specific retaliatory municipal policy. And again there's no allegations of a retaliatory policy here. Even if there were, that would only be successful in a claim against the district, not against the officers. Then we turn to Nieves. Again Nieves doesn't apply here, because there's no allegations of objective evidence that Mr. Story and Mr. Clark were arrested where other similarly situated people not engaged in the same sort of protected speech were not arrested. If that were the case, then you could draw an inference that the speech was the cause of the arrest, but that's not what happened here. On the contrary, what we have here is people who are not similarly situated also engaged in the same speech, but they're not arrested. Well, the fact that there are other individuals that

Ms. Long specifically referred to who engaged in the same speech were warned and told they couldn't, stopped speaking, walked away from the microphone. Mr. Story is the only one who remained at the microphone, continued to speak after being warned, forcing officers to remove him from the room. That's not a situation of similarly situated people engaged in -- not engaged in the same conduct.

Judge, turning to the excessive force, again the allegations about excessive force are very vague. We don't know who committed the excessive force. We also know that the injury is de minimis under longstanding Fifth Circuit law. You look at, you know -- and of course, the Fifth Circuit does say any injury can support a claim of excessive force if the force was unreasonable. Consider the context. Mr. Story, and this is as pleaded in the Complaint, for 45 minutes Mr. Story and several other parents are outside yelling at officers, confronting officers, attempting to push their way through into the meeting. And officers are using measured and ascending, I guess, measured and ascending force to repel, I guess, Mr. Story -- because this only applies to Mr. Story, not Mr. Clark -- from the board meeting.

That's absolutely reasonable, a reasonable amount of force given the fact -- and there's plenty of Fifth Circuit cases that hold this, specifically I would cite the Court to the Buehler decision where they say, *In case after case, use of*

takedowns to gain control of suspects who had disregarded lawful police orders or mildly resisted arrest did not violate the Fourth Amendment even where minor injuries occurred.

So again even if you get past the fact that he hasn't told you who allegedly injured him, this is de minimis force, this is a situation where reasonable -- a de minimis injury, reasonable force, even in the face of a minor injury. I'm not going to rehash qualified immunity which Ms. Long already addressed, but again there's no constitutional violation alleged and definitely not a clearly established right that's been alleged by the plaintiffs. Thank you, Judge.

THE COURT: All right. Thank you. Okay.

MR. NORRED: May it please the Court. I'm going to start with the end and go backwards. So just responding to what we've heard today so far, opposing counsel have argued that all Mr. Story had to do was wait his turn for a general meeting where he could speak on any topic he liked. As you see in the petition, there were several meetings, none of them were general meetings. They were not having meetings that were general meetings for months on end, and that necessitated the activity. Even if --

THE COURT: I thought, in reading the documents, there was one general meeting that -- am I right here?

MR. NORRED: That was the tax hearing meeting, yes. That's after the tumultuous one beginning.

THE COURT: But there was a general meeting.

MR. NORRED: Right. That's the tax hearing. So I generally put this into the physical altercation meeting which happened first and then there's a second meeting which was the tax hearing meeting where you had the diminished seating. So Mr. Story was forced out of the room for speaking on a non-germane topic after months of non-general meetings where if they wanted to say he couldn't talk about it, they could always do so. And opposing counsel kind of demonstrated the difficulty here. Opposing counsel and Ms. Weir, they both see that any mention of a protective order is outside the boundary. You can mention slavery as long as you have the word "mask" in or COVID in there, and that's okay. You can insult Senator Cruz, you can talk about QAnon, you can make all sorts of insults as long as you have the word "mask" in there, you're okay. But if you try to use the word "mask" and say Why are you worried about this danger when you're not worried about the superintendent, and he actually has a real protective order, and they go ballistic and say that's too far away.

I've given the Court maybe a dozen examples over the course of months where their public comment rule is sometimes not enforced, sometimes it's enforced sternly, I have not claimed that it is -- well, at one point I did, but I have not really argued that it's facially unconstitutional as to subject matter. I have said that it's unconstitutional for vagueness

because it is so vague that you can't tell what's inside the boundary and outside the boundary. Then we've said and if that's not obvious, it's facially as -- sorry, it's as applied unconstitutional because you can look at the multitude of examples. The last one that I did the look-up on and added to the amended petition or Complaint was I think Ms. Feller or Ms. Weir said as long as you eventually get back around to the subject, that's good enough. But would it be good enough if Mr. Story got up and got around to it? We have demonstrated that that wouldn't be the case, it just wouldn't be. We know because that's what happened.

Paragraph 102 of our Complaint we talk about how others were allowed to speak out, not just from the podium, but like Mr. Clark was sent out for speaking out repeatedly, others were allowed to speak out, they weren't sent out. We've talked about paragraph 102, Weir enforced the rule arbitrary to favor some. I have a number of notes. You can do a search on each one of the names of the individuals and you see what we have alleged about each one. It is true that some of these trustees are more active than others, but for example, Xiao and Weir talked about the violation of the seat spacing and decided that was okay and the five of them voted on that. Okay, so we would say that that's actively violating the right to petition.

In paragraph 146, we say specifically they're allowing for more speech for some than for others based on viewpoint,

and again we give examples. Opposing counsel just a few seconds ago said that other people stopped, therefore, they weren't punished. Okay. You've successfully chilled the speech of some, so that makes it okay that you physically have an altercation with somebody who is not willing to take it. And the key phrase that opposing counsel gave just a minute ago was lawful order. You have to obey the lawful orders. And let's remember what that lawful order is. We have a First Amendment, dare say one of the founding principles of our country that we don't have taxation without representation, we have the right to petition.

Then we have a Texas state law that says, hey, this is a big deal, when you have a tax hearing for an independent school district you've got to allow the public not to just attend, the state law says participate. Two way, you didn't get that there. And as the Court remembered, we had this excuse of Delta variant showing up. Less than a week later, eight days maybe it was there was a meeting of more than 300 people in that same room. There was no intervening new medical understanding or recognition that we had conquered COVID now. And we do have pictures from various types of the various parts of the room, if they walked in and there were 18 chairs there, they had an obligation to allow everybody in there, and they didn't. There were hundreds of people outside. That's in the petition. So there was not public participation, there was a

direct deliberate attempt, I would say at almost at a summary judgment level of evidence that they were deliberately maneuvering the situation so that they would not have to deal with a crowd of people who were not happy about their taxes going up.

THE COURT: Look, one of the concerns that I have is that your Complaint contains a lot, a lot of supposition and conjecture. I mean, you make these very broad allegations of a conspiracy. Many of the board members who you sued did very little, if anything, if I were to read your Complaint. The only two board members you didn't sue were the ones who voted against having the superintendent hired. The ones you did sue were the ones who voted in favor of hiring him. Now, that's not a constitutional violation.

MR. NORRED: True. A lot of our allegations against the five instead of the seven revolve around the Open Meetings Act, again not a constitutional violation.

THE COURT: You are not going to win on the majority of these -- now, this is a motion to dismiss. This is not a motion for summary judgment.

MR. NORRED: Right.

THE COURT: So I have to take the allegations in your Complaint generally as true for this purpose. But there also has to be some basis for them, and just suing somebody because they voted in favor of hiring somebody that your client thinks

is a bad person for whatever reason does not withstand scrutiny even under the liberalist pleading standard there is, just doesn't. Now, there are allegations in your Complaint I think which do at this stage. I mean, there's suggestions about your client being manhandled and taken out and so on and thrown to the ground. Those things I think are such that they well may survive a motion to dismiss, but some of this is very -- I mean, you basically without any basis, except in somebody's head, and maybe there is a conspiracy, I don't know if there's a conspiracy or there isn't a conspiracy going on, but you can't just say there's a conspiracy. That doesn't suffice.

MR. NORRED: Your Honor, I understand that.

THE COURT: And your Complaint just says that time and time again. It doesn't work.

MR. NORRED: Your Honor, I've been in front of a lot of courts, and some courts will have come down firmly on one side of a set of claims in a way that I would not have and others do, and I never know how a Court is going --

THE COURT: I am all for the First Amendment, okay. I am all for people's right under the First Amendment. I mean, I was given -- I think I'm the only judge ever to receive the Freedom of Information Award from the Hawaii Journalism Society. I recently got reversed in the Fifth Circuit for issuing a decision with a very, very strong dissent from a number of judges that supported a person's First Amendment

right, so I am not anti First Amendment, but you can't just say these councilmembers engaged in a conspiracy. That doesn't fly. That's great for political speech. I'm perfectly happy to have somebody have that viewpoint and speak it and that may be a First Amendment right. You can certainly stand out in front of the courthouse and say there's a big conspiracy or in front of the board, wherever these board meetings are held, and say I think there's a big conspiracy going on here. That's perfectly okay. But you're suing predicated on a constitutional violation, so you have to have more here than just simply, you know, we didn't sue these two people because they voted against this superintendent, who may or may not have been appropriately hired, I don't know. But we sued these others because they're in a conspiracy because they voted to hire him. That's not a constitutional conspiracy.

MR. NORRED: If I might, paragraph 14 talks about the five trustees and what they did concerning -- and the Court takes into account understood facts that are proveable and we can show and natural inferences, just natural. And I'm not looking for the conspiracy on this, I'm just looking for the TOMA violations against the five. If this Court says, look, this unnamed fifth trustee you never talk about, I'm letting him out, my issue is I've got a school district that says we can beat on people if they talk about things we don't like and we can hire people illegally. That's the crux --

THE COURT: I think you're going a little far here. I don't see any direct evidence of that. I do see that there certainly are -- there is an instance where your client was at one point, you know, taken out of the room and there was another altercation. I don't know whether that was when he was trying to get in the room or he was getting out of the room, I'm not sure. He went up against a pole and was hurt at that point. If this was a summary judgment motion, there would have to be a lot more there, okay. But this is not a summary judgment motion, it's a motion to dismiss. So I think that may well survive, but a lot of this conspiracy stuff is just -- it's not going anywhere.

MR. NORRED: But let me give you an example.

THE COURT: And I'm not doing you any favors because it isn't going anywhere in any court.

MR. NORRED: I understand that. Opposing counsel says we haven't talked about the training. This Court just now said you're not giving me enough. Paragraph 86 we say Chief Yarbrough states at a Texas school board -- Texas Association of School Board meeting to an individual who is also a former police officer and Yarbrough admitted in public his officers did not have proper school resource officer training, they only had typical municipal street patrol training. That's paragraph 86. Does opposing counsel want me to come up and say here are --

THE COURT: You have to remember something now, this is a public meeting. We're not talking here about officers who go about working day in and day out in a school, okay, with a school setting. That's a totally different situation. That's what you're talking about. When you're talking about a public meeting, you're talking about people -- it doesn't matter whether it's a school meeting or it's a City Council meeting or what kind of meeting it is, you don't have to have specialized law enforcement training as a school resource officer just because the subject matter of the meeting happens to be something to do with the school. School resource officer is working in the school and they should have specialized training, but that's not what we're talking about here.

MR. NORRED: We are talking about an open meeting.

THE COURT: What is he doing?

THE PLAINTIFF: I'm asking if I can speak on my behalf, Your Honor?

THE COURT: No, sir, you cannot.

THE PLAINTIFF: Because I know a lot of the facts here.

THE COURT: Look, this is not the time or place for your extensive knowledge of the facts, and I'm not trying to be denigrating at all. There is a time and place for it and that will be at trial, if we get to trial. It's not here. All right? You have very competent counsel, he's perfectly careful

in arguing your position.

MR. NORRED: I'll put that on my Yelp review.

THE COURT: I've been a federal judge for 35 years, so --

MR. NORRED: As long as we have this one second of that. You are the person I think of when people talk about moving back to Texas from someplace as though Texas is not the greatest, because I said I know a judge who moved here from Hawaii.

THE COURT: Don't remind me, please.

MR. NORRED: I don't know, seems like grade A evidence to me, but anyway, I should probably continue.

City Council members and members of -- not City Council, school board members are required to get Open Meetings Act training.

THE COURT: Sure, of course.

MR. NORRED: And they give the nod to the police to move people. Now, we have a pending motion to amend this, but as you can tell, we've been here a year and I didn't want to --

THE COURT: That's not my fault. I just got this case.

MR. NORRED: No dispersions cast, but we had other events at school events just recently as November where the police said no you can't pass out political fans in a public area.

THE COURT: Political what?

MR. NORRED: They were fans with names of candidates on them.

THE COURT: Oh, okay.

MR. NORRED: Political propaganda, electioneer, but they're in a public area, and this is on school grounds. So there's a lot going on here. We had a 70-page Complaint, right, so there's a lot going on.

THE COURT: I fully understand.

MR. NORRED: The Court doesn't want to read through one more word from me until he trims it down to the extent that he wants to, but let me just skip through, in the famous words, briefly.

As we talk about the petition, one of the officers was reading a section of Texas law to defend keeping out Mr. Story and other people, and he deliberately cut out the part that would have said that this law that he's quoting doesn't apply. Now, it's in our Complaint, so here you have --

THE COURT: I did read that.

MR. NORRED: So he is deliberately misstating the law to abuse people and keep them out of a room during a meeting that lawfully has to be open to everybody. And if we were talking about a thousand people trying to get into a 20-person room that we didn't know about, that would be a different question. It's a room that would have easily handled all the

people that were there and didn't, only because the desire of the people who are running the show was that they not be allowed in. And that is the natural reading of what happened. I don't think that that's a stretch. I think you can see it the next week when you have the next hearing and there's hundreds of people there with no intervening medical instructions that, oh, now we can do things. And before that, we had the same thing, so that's all in there.

We talk about the flaws in the warrant. I think that, of course, the warrant is in the Exhibit 1-1 at page 198. You can see Officer Pope is giving the information to the affiant.

THE COURT: What happened to those charges? I wasn't clear.

MR. NORRED: My understanding is that --

THE COURT: Were they dismissed?

MR. NORRED: -- they're in limbo forever. Nothing has happened.

THE COURT: He's still charged?

MR. NORRED: He's still been charged and it's not going anywhere. Some people might say that it's a deliberate decision not to do anything until this case is over, that's what some people might say. All of the local people who might prosecute these charges have said no thanks. That's what I can tell the Court without a doubt. It's not going anywhere. So we're going to have to wait until the statute of limitations

runs out and then it will go away long after the damage is done.

THE COURT: No, I don't think it's a statute of limitations that you would be concerned about because they brought the charges. It would be the speedy -- whether he received a speedy trial. That's what you would be concerned about. But anyway, let's move forward. You're not a criminal lawyer. I wasn't a criminal lawyer either, but I've been a criminal judge and civil judge for a long time, so I learned that stuff, but that wasn't my calling. I was a trial lawyer.

MR. NORRED: I think my criminal cases can be counted on one hand, but one of them I am involved in is whenever there's a politically trumped-up charge, it usually dies for lack of attention and then you can get it expunged. Not while we're here.

Opposing counsel talked about we can't argue both the Franks and Malley violation, citing *Kohler versus Englade,* 470 F. 3d at 1113. That's an imprecise analysis. In that case in Kohler, the Court said you've already failed under Malley, so Franks is inappropriate. We can argue both and this Court can decide to pick one. Obviously if you get one, you don't need the other, it's inappropriate to go to the other one.

And now we're moving pretty fast. We've also suggested -- and I apologize, as the Court may guess, whenever I'm trying to answer three different motions to dismiss they

wind up kind of running into each other, so I think at some point in all of them I said we incorporate from reference all these things from the other.

THE COURT: That's why I was asking you some pointed questions because I want to be sure that I understand where you're coming from and what your view is, what your argument is.

MR. NORRED: I appreciate that. And sometimes -- it's one of those things where if you kind of change your viewpoint halfway through one of the documents, you have to go back and make sure that you're consistent.

THE COURT: I hope so.

MR. NORRED: It's a goal, you know. So we would say that officers abuse *Alexander versus City of Round Rock* in their reply to say only objectively unreasonable force allows us to get past the pleading stage. We think that's an unsupportable twist on what Alexander teaches. The correct teaching is that if objectively unreasonable force is present, then any alleged injury is sufficient. But we don't say in Alexander -- Alexander does not say that this Court has to find objectively unreasonable force at the pleading stage. I don't think that's what Alexander says. There may be another course, not my area of court of the law, but that's an issue.

Opposing counsel and the officers want to defend on the basis of Story did this to himself by trying to disobey

police, but officers want this Court to ignore the officers were not actively breaking the law, actively breaking Texas law to prevent the public from participating in a tax hearing. As opposing counsel said, I'm not afraid of the video. If the Court wants to watch the video, I applaud that. It helps to cut down the noise, you can see what happened. What you can't see is how others were treated better --

THE COURT: I have a little bit of a problem. In a motion to dismiss, I am bound to stay within the four corners of the pleadings and the only time I can look -- there's a few exceptions to that having to do with documents that are appended to the Complaint and so forth. But generally speaking, if I step outside of that, it's a motion for summary judgment, then we're arguing about the appropriate -- I'm sure at some point there will be a motion for summary judgment in this case, but this is not a motion for summary judgment. Now, I could convert it to a motion for summary judgment, I have the authority to do that, but that would be grossly unfair because if I convert it to a motion for summary judgment, you're going to be stuck and so will the other side with the record as we sit. And there may be other evidence that you will want to bring to the attention of the Court that you hadn't brought forward because this was a motion to dismiss and not a motion for summary judgment. So I can't be wandering off and looking at videos and testing credibility of witnesses and so forth

because that is for another day at another motion, in another type of motion. People don't understand that we have rules here.

MR. NORRED: Which I appreciate, Your Honor. And I'm just about done. Government entities often will say you have not shown that we should have known what we were doing was unconstitutional, and they get away with that all the time. And that's what's happened here. They said, well, you haven't shown that our officers should have known that they should let people into this tax meeting. Except, as we've pled, the law was shown to them during that event. And they read the law and they responded with other law and said, Oh, yes we can, by deliberately omitting key components of what they were reading. We detailed this in excruciating detail in our pleading. So we would say that they are absolutely responsible for knowing what the law was when they're reading from the law and determining how to misrepresent it so they can continue to play the part of bouncers at a dance club where the manager says let these people in and don't let these other people in, because that's what was happening and we do say that.

Let's talk about the conspiracy and then we'll wrap up. Officers site the Hilliard case which involve a school district and a superintendent. In that case, the superintendent's actions were all aligned arguably for the good of the district. What we don't have is a set of employees who

were acting to the detriment of the district while they're breaking state law, targeting dissidence for arrest. And even Hilliard says, *A corporation cannot conspire with itself any more than a private individual can. It is the general rule that the acts of the agents are the acts of the corporation.*

The general rules have exceptions. We have not alleged several of our claims against the entire district. We've said these individuals are the ones that are doing the damage.

Weir told the cops to remove Jeremy Story. It wasn't some nebulous Round Rock ISD. Now, we may find that in the way that our system works Round Rock ISD is responsible for the actions of its agent, but Round Rock ISD did not nebulously -- nebulous entity did not do it, it was Weir that did that. So we have not said that the entire district did it. We have said that these individuals did it. And I can give you a number of cases. I'll just give you one and it's hard to spell, *Jokeck(ph) versus Clayburn*, it's 3-92-113-CV, 1993 Tex. app, Lexis 1632. The Court held the general rule is inapplicable where there's a breach of fiduciary duties, it also ruled that malice could be applied by the breached fiduciary duty, and the decision was affirmed.

There are other cases where people work for an organization and there is a conspiracy established. So this would be -- I would think that this is an exception to that

rule. We have a long way to go before we prove this, I get that, but what we do have is we have a set of real things that happened, insurance purchased for Azaiez before he was a finalist. There was a lot of communication between the five and Azaiez. That's pled with real facts that are supported. All of this started with an Open Meetings Act violation, all of it, at least that's what our pleadings say.

THE COURT: Okay. Well, all of this might provide a background or a backdrop for why your client was upset and he wanted to say something, but I have a standing issue here that I have to deal with also that hasn't been raised. Let us assume for just a moment that three or four and five members of this board were in some sort of nefarious conspiracy to hire this unqualified person, okay. How does that violate your client's constitutional rights?

MR. NORRED: It does not.

THE COURT: It doesn't. And that's the problem. Now, it certainly would be evidence of maybe something else going on, okay. It might be evidence of why your client was speaking, he wasn't just running in there for something else, you know, just to be heard or to hear himself, but it isn't -- and it might be a violation of state law, it might be a violation of federal law. Who knows? I don't know. But it wouldn't be a violation of your client's constitutional rights, either client's constitutional rights because they're not in a

position to be harmed any more than the general public. See, they don't have, really don't have standing to raise that claim in a private 1983 suit.

MR. NORRED: Well, of course, our claims start with the unequal -- the as applied public limited public comment rule. That's where we get our --

THE COURT: That's different, that's not hiring this guy and giving him insurance and all that stuff. That has to do with maybe they did something they shouldn't have done, I don't know. I'm not suggesting they did or they didn't. I haven't have the faintest idea. I'm sure they have a very different view from it than you do. But that doesn't create a constitutional cause of action for your client.

MR. NORRED: Your Honor --

THE COURT: Might create a cause of action for the Attorney General, but not your client.

MR. NORRED: Let's say that Jeremy Story goes in there, he says his piece, he's not interrupted and he leaves.

THE COURT: Okay.

MR. NORRED: He's not tackled, he's not arrested, none of that happens.

THE COURT: All right.

MR. NORRED: Well, we're in state court on an Open Meetings Act claim at best. We're here today because we have the right to petition and right to free speech and be treated

like everybody else --

THE COURT: I just told you that. You and I are talking right past each other, I think. I am not suggesting for a moment that whatever occurred there may not at the appropriate time be evidence of one thing or another, but what it isn't is an independent cause of action for your client. He has no standing to raise that issue as an independent -- it isn't a violation of his rights, his constitutional rights, it just isn't.

MR. NORRED: I'm not suggesting --

THE COURT: Now, his speaking and being told that he couldn't speak for whatever reason, if we get to trial, that may or may not come in as evidence of why he wanted to speak and why they wouldn't let him speak. Okay? That's evidence. But it isn't a cause of action, it just isn't. He doesn't have standing to raise a board malfeasance as an individual cause of action. It may be the reason why he is doing something or other, but it isn't his constitutional cause of action, it just doesn't exist.

MR. NORRED: I don't think that we have alleged that.

THE COURT: Well, it kind of sounds like that in your Complaint. But regardless of whether you did or didn't, you're not going forward on it. I hope that you didn't allege it because if you didn't, we don't have a problem.

MR. NORRED: I don't think that we alleged that we

have a claim for malfeasance. Now, I think I may have just used an example.

THE COURT: You don't claim malfeasance, you claim conspiracy. That's not malfeasance. Conspiracy is a -- it's an overt act taken in furtherance of an illegal objective. That is not -- malfeasance can be part of that. Malfeasance can be just gross negligence. It can be somebody who doesn't know what they're doing. It can be somebody who has no --

MR. NORRED: I always thought that malfeasance requires a bad intent, but we're not alleging -- we allege the conspiracy --

THE COURT: So now you're in the area of some ambiguity here. It depends upon how you look at it. That's why I just said, I said malfeasance can be part of an intentional act or, or it can be just gross negligence as we use that term commonly.

MR. NORRED: Well, I'm not sure that either of those phrases are in my pleadings.

THE COURT: No, I don't think so.

MR. NORRED: So what we're alleging is that the five defendant trustees have a goal and their goal is to protect their man, the superintendent. And whenever somebody jeopardizes that goal, we wind up with an injury and that's what we're suing on.

THE COURT: What you can sue individuals for are

concrete constitutional violations that you allege that they did. And to the extent that you allege that somebody made a -- has done something that violated your clients' rights, that could well be cognizable. Some peripheral thought that somebody might have in the back of their head as to what is or is not appropriate isn't a constitutional violation.

MR. NORRED: I hope we haven't alleged that. I hope that what we've alleged is that --

THE COURT: I was trying to find some concrete examples, but you do have some instances where people said or did things, and those things I have to look at very carefully. As I told you, when I construe this Complaint that you filed, all 70-some pages of it, I will construe the evidence, the facts, in a light most favorable to your client as the nonmoving party. That's what I have an obligation to do and that's what I will do.

MR. NORRED: Thank you, Your Honor.

THE COURT: Okay. All right. Thank you very much. Any rebuttal? Very brief.

MR. ROTHEY: Thank you, Your Honor. Just one point on procedural clarification, I don't believe there's a pending motion to amend the Complaint. They filed the original Complaint, we moved to dismiss. They filed an Amended Complaint as a matter of right and I don't know that there's any pending motion.

THE COURT: I think we're in the Amended Complaint.

MR. ROTHEY: That's right, Your Honor.

THE COURT: I think we're in your Amended Complaint.

MR. NORRED: I'm sorry, I didn't want to confuse things. We have a pending that nobody has seen yet that's mostly written, but we wanted to wait until we get past this first.

THE COURT: Don't say -- counsel, look -- you can be seated. In federal court when you say to me, Judge, we have a pending motion to amend, you know what that says to me?

MR. NORRED: Misstatement of fact, Your Honor.

THE COURT: It says to me that you have something filed that I haven't ruled on. So this one jumped about 4 feet in the air over here because it's her obligation to keep me advised, and so you're telling me, *Well, we haven't finished writing it.* Well, obviously, I haven't seen it yet. Hope it's not 80 pages long.

MR. NORRED: It is not, Your Honor.

MR. ROTHEY: Since the Court expressed some concerns on the excessive force, I just wanted to make some clarifications. One, Mr. Story doesn't claim excessive force with respect to his removal from the August 16th meeting. He doesn't claim -- and Mr. Clark doesn't claim excessive force with respect to his removal from the September 14th meeting. The only allegation of excessive force is by Mr. Story with

respect to the September 14th meeting where he claims that he was not allowed to enter the board room.

THE COURT: Was that the one where he was pushed against the pole?

MR. ROTHEY: The allegation is that he was pushed against a pole.

THE COURT: That's what I was talking about.

MR. ROTHEY: Okay. And the point of clarification I want to make there, and I'm just quoting the *Buehler v. Dear* case from the Fifth Circuit last year, when you're making claims brought against multiple officers in connection with a single arrest. We're not talking about arrest, but we're talking about the excessive force, the reviewing court, of course, must analyze the officers' actions separately.

The problem here is we don't know who did what. The allegations in the Amended Complaint don't say which officer bear-hugged him or which officer caused the injury or which officer exerted excessive force. So do we just allow the claims to proceed as to all the officers because we don't know who it was? I don't think that's what the Fifth Circuit is saying.

THE COURT: No, the law doesn't allow that, but if I were to dismiss portions of the Complaint for that reason, it would generally be without prejudice for them to correct the problem.

MR. ROTHEY: Correct. If there's not --

THE COURT: I mean, if they know who the officers were, one would assume they would.

MR. ROTHEY: If there's not a legal basis --

THE COURT: Obviously.

MR. ROTHEY: With respect to the conspiracy, Judge, the law we cited in our brief is very clear. A conspiracy allegation against a government entity, you've got to have a private actor. A government entity can't conspire among itself. They've kind of alleged that Williamson County Sheriff's Department, but they haven't brought them in as defendants or alleged that they were a part of the conspiracy.

And this allegation that -- again, the Court raised some concerns about the amounts of supposition and conjecture in the Amended Complaint. When Mr. Norred pleads, or Mr. Story pleads that the officers were standing out there deliberately misstating the law, I think the Court can accept the allegation as true that the officer misstated the law, but this idea that there's deliberateness or intent to misstate, there's no support for that in the allegations, and that's just a conclusory allegation.

THE COURT: His counsel's suggestion was that he read part of the statute, but did not read the rest.

MR. ROTHEY: And again, I would -- what I would ask is, well, where is the -- how do you draw an inference that

there was deliberate, not just that he didn't read part of it, but that he deliberately didn't read part of it so that he could justify his allegedly illegal actions, which by the way, were not illegal because there are officers there to enforce a social distancing rule that is constitutionally valid. So the officers were acting in compliance with the law in limiting access to the board meeting.

And the other thing the Court should be aware of and this is apparent in their allegations in the Complaint and in the warrant, while there was limited amounts of seating in this area where the board was sitting, there's an overflow where additional people were, the whole thing is live streamed. The August 16th meeting, for example, involved six hours of public comment from people present including Mr. Story, from people in the overflow who came in and then left, and from people online. So the idea that Round Rock ISD is somehow trying to limit public comment or prevent people from participating in the meetings, it seems really absurd in light of the fact that -- and you can look, the August 16th meeting is eight hours long. The video is eight hours long, six hours of that public comment.

THE COURT: Well, at some point I suspect I'll have to look at that. I don't know how I'm going to do it, sit there for eight hours?

MR. ROTHEY: Well, and, Judge, we've cited specific

smaller sections.

THE COURT: There are sections of it, most of it is not relevant.

MR. ROTHEY: Yes, Your Honor. That's all I have.

THE COURT: Not that those people's comments aren't important.

MR. NORRED: Just seconds?

MR. ROTHEY: Thank you, Judge.

THE COURT: Okay.

MR. NORRED: Officers -- paragraph 82 says that Chief Williby watched the officers manage to use force that caused the cut in the back. Paragraph 78 to 79 state that these defendants were identified as Pope and Pontillo. We have identified them. Thank you.

THE COURT: I remember Pope and Pontillo because it sounds so much like -- who were those two guys?

COURTROOM DEPUTY CLERK: Portillo and Pike.

THE COURT: Portillo and Pike, which was a three-and-a-half-month criminal trial I had over felony murder.

MR. NORRED: No relation, I assume.

THE COURT: I hope not. They were convicted and their convictions were affirmed all the way to the Supreme Court. They're not coming back from federal prison.

But I was reading that, I was going, my God, the name sounds awfully familiar with me. Nothing to do with this case.

All right. I will do the very best I can to get this out as quickly as I possibly can. One of the problems I have is the reason I'm sitting here and not Judge Yeakel is because Judge Yeakel is, as you know, retiring. If you don't know, he is retiring. And May 1 he's gone, last day of April. He's going to work at a law firm here in town and have, I hope, a good second career for himself, or third career really. And I am going to inherit a very substantial chunk of Judge Yeakel's 250, 300 cases maybe.

In addition, of course, I sit in San Antonio also. So I kind of run back and forth, and a lot of these cases are like this case. I treat every case the same, an important case in the eyes of the people who were involved. I don't triage cases and this one is important and this one isn't. We try to do them as quickly and as expeditiously as we possibly can consistent with doing a fair and right job. That's the name of the game, and not just to rush things out the door. But I'm not looking for anybody's sympathy because I can retire too if I wanted to, but it's just a practical matter. I mean, I just have so many cases on the docket, it's impossible to get through things as quickly as I would like to get through them. So I will do the very best I can.

Most federal judges have two law clerks and a JA. I have four law clerks because my docket is so heavy. And they don't give you extra law clerks for nothing, believe me. So

I've got two here in Austin and I've got two in San Antonio. So we're going to do the very best we can to get it out as quickly as we can, but sometimes the parties have expectations that we had our hearing and, gee, we should be getting a decision here next week. Isn't going to happen. But it isn't going to be an inordinately long time. I'll do the best I can to get through it. You've got a very lengthy Complaint which makes it on a motion to dismiss -- I'm not complaining about it, but it makes it much more difficult for me to get through it. Most Complaints are 10 or 15, 20 pages at most. This is 70 pages, and you make all kinds of allegations in those 70 pages. And they have filed a very detailed, as you well know, motion to dismiss. So I have to give credence to the arguments that have been raised by them and your defenses to those arguments, and that takes a while.

I won't be looking at the video because it's outside of the pleadings, it's evidence that is not part of the pleading and so this is not the appropriate time for me looking at the video. That would have me judging the credibility of the evidence and I'm not allowed to do that in a motion to dismiss. I have to take your allegations in your Complaint as carrying weight and then determine whether they have a legal argument and a factual argument, unless your allegations are fanciful, but a factual, a legal argument as to why this can't stand for one reason or another. Okay.

All right. Thank you very much for your arguments today. I do appreciate it very much and for your courtesies and I will do the very best I can to get this out as quickly as I possibly can. I always put out a written order. I know a lot of judges give you these little short orders. There's no short order out of me. You will get a written order that is consistent with my review of all of the arguments and the evidence. Okay?

COURT SECURITY OFFICER: All rise.

MS. LONG: Thank you, Your Honor, for giving us this time today for both of us with your busy docket.

THE COURT: Well, it's okay. Federal courts don't have oral argument very much anymore. If you're a lawyer in Los Angeles, if this case was filed in Los Angeles, there would be no oral argument, absolutely no oral argument at all, zero.

MR. NORRED: I don't normally like them, but in this case I did because I wanted to make sure we answered the questions.

THE COURT: There are cases I can decide without oral argument, but where I think that oral argument would be beneficial, I give the parties the opportunity to do that because we're trying to get to the right result.

(3:00 p.m.)

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date signed: June 2, 2023

/s/ Angela M. Hailey

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